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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term 1971

No. 71 - 536

MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, Deceased,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Prior Determinations of the Courts Below	2
Jurisdiction	2
Statement	2
Questions Presented	5
Reasons for Granting the Writ	6
Conclusion	12
Appendix A Judgment USDC SDNY	1a
Appendix B Notice of Appeal to the U.S. Court of Appeals for the Second Circuit	3a
Appendix C Decision and Judgment of the U.S. Court of Appeals for the Second Circuit.....	5a
Appendix D Order denying petition for rehearing by appellant with request for certification of a question to the Supreme Court	26a
Appendix E Order denying petition for rehearing by appellee	28a

TABLE OF CONTENTS

	Page
Appendix F Order denying petition for rehearing in banc by appellee	30a

CASES CITED

Alaska SS Co. v. Pacific Coast Coal Co. 311 U.S. 687	7, 9
Andros Shipping Co. v. Panama Canal Co., 184 F. Supp. 246, 298 F. 2d 720	7,9,11
Boyer v. The Merry Queen, 202 F. 2d 575	7
Denali The, 105 F. 2d 413	7,9,11
Eastern SS Co. v. International Harvester, 189 F. 2d 472	7
Kernan v. American Dredging Co. 355 U.S. 426	6,10,12
N.Y. Marine No. 10, 109 F. 2d 564	11
Pennsylvania The, 86 U.S. 125	5,7,8, 9,10,11
Petition of Long (The Smith Voyager) 439 F. 2d 109, 293 F. Supp. 172	7,8

TABLE OF CONTENTS

	Page
CASES CITED	
Petition of Marine Sulphur Transport Corp., 312 F. Supp. 1081	7
Petition of Sincere Navigation Corp. (DCED La.) Civ. Act. #68-22-54	7
Pittsburgh SS Co. v. The Atomic, 107 F. Supp. 631	7
Princess Sophia The, 9 Cir., 61 F. 2d 339	10
Provenza v. American Export Lines, Inc. 324 F. 2d 660	7
Richelieu and Ontario Navigation Co. v. Boston Marine Ins. Co. 136 U.S. 408	6
Waterman SS Corp. v. Gay Cottons, 414 F. 2d 724	6
Waterman SS Co. v. Shipowners and Merchants Towboat Co. 199 F. 2d 600	6
STATUTES CITED	
28 U.S.C. 1254 (1)	2
46 U.S.C. 235	3

TABLE OF CONTENTS

	Page
46 U.S.C. 673	3
46 U.S.C. 688	5,6
45 U.S.C. 51 et seq.	6
46 U.S.C. Sec. (b)(e)	8

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, Deceased

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AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petitioner, Margaret Ann Wilkins as administratrix of the estate of William Lane Wilkins prays that a writ of certiorari be issued to review the decision and order of the United States Court of Appeals for the Second Circuit, decided June 21, 1971 reversing a judgment of the trial court and a jury in favor of the defendant.

PRIOR DETERMINATIONS OF THE COURTS BELOW

The within case was tried before the District Court for the Southern District of New York, Judge Richard H. Levet presiding and a jury. The jury verdict, in favor of the defendant and judgment dismissing complaint were rendered on the 20th day of May, 1970. An appeal was taken to the Court of Appeals for the Second Circuit, the opinion of which is not yet officially reported but was decided June 21, 1971 and is attached hereto as an appendix. Timely application for reconsideration and/or for reargument en banc was made by the appellant and denied without opinion on July 19, 1971. Copies of the decisions denying relief by way of reconsideration, reargument, certification of a question to this court or otherwise are also attached as appendices to this petition.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the authority of 28 U.S.C. 1254 (1).

STATEMENT

This is an action by the plaintiff as Administratrix of the Estate of her deceased husband, a merchant marine officer against his employer the shipowner, to recover damages for the decedent's death which resulted from a heart attack suffered during the course of his work.

The decedent, William Lane Wilkins, was employed by the defendant as Chief Officer on board the SS EXTAVIA from August 1964, when he signed articles for her forthcoming voyage until October 6, 1964, the date of his death. On September 18, 1964, while traversing a leg of the homebound passage between Leghorn, Italy and Barcelona, Spain, the SS EXTAVIA while under the command of the second officer suffered a collision with another vessel. Following the collision, Wilkins was required by the defendant to put in over-time hours in the performance of his duties augmented by those of the second mate who was relieved of all navigational duties on September 20, and as a result, both of the lower courts found that Wilkins had worked overtime on every day consecutively, with the lone exception of Sunday, October 4, from September 19, 1964 through October 6, 1964. While the vessel was in the seaway, shortly after leaving the bridge on the evening of October 6, the decedent suffered an acute heart attack manifested by extreme pain in his chest. A hurriedly summoned coast guard cutter rushed him to a hospital ashore where he died within minutes after his arrival there.

Regardless of whether the case is considered as governed by the provisions of 46 USC 235 or 46 USC 673, it is undisputed that Wilkins was thus required to work in violation of a safety statute enacted for the benefit of seamen on every one of the days between September 19,

1964 and October 6, 1964 inclusive, except October 4, (App. C p. 9a).

Plaintiff in her requests to the Trial Judge with respect to the charge to be given to the jury was refused any charge with respect to the effect to be given by the jury to the violations of statute in question. Several variations of a charge that would have invoked a presumption in the plaintiff's favor arising by reason of such violation were refused and exceptions to such refusal were duly taken by plaintiff's counsel.

Instead, the Trial Judge erroneously as determined by the Court of Appeals, withheld any consideration by the jury of statutory violations occurring between September 19 and October 3 (App. C p 10a). Further the Trial Judge, over express exception of the plaintiff's counsel, submitted the case to the jury as one in which the plaintiff had the burden of proving negligence by a preponderance of the evidence and without giving effect to the violations of statute, admittedly occurring, which may well have contributed to the decedent's death.*

*The Appeals Court stated the problem thus (Appendix C, page 16a) "At the trial the judge rejected the plaintiff's contention that the burden was on the defendant shipowner to prove that its statutory violation not only did not but could not have contributed to the decedent's death."

The Court of Appeals in considering this alleged error, though returning the case for a new trial, repeated the error of the Trial Court in refusing to give effect to the admitted violations of statute stating:

> "Finally, as a judgmental matter, we are not persuaded that there are broad considerations of policy which require that we extend the admiralty rule of The Pennsylvania beyond the chosen area of ship collisions to embrace Jones Act cases."

It is respectfully submitted that in so doing the Court of Appeals not only held erroneously with respect to an important matter of law affecting the trial of many Jones Act and seaman cases, but required the holding of a new trial pursuant to an erroneous application of the law by the jury.

QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals reflect an unsettled condition of the law with respect to the scope and application of the statutory fault rule (the Pennsylvania rule); is it in conflict with the law stated in other circuits and indeed inconsistent with prior holdings of the Second Circuit itself?

2. Is the so-called statutory fault rule of the Pennsylvania, 86 U.S. 125, limited to collision cases only?

3. Is the holding below that the Court will not "extend" the rule of statutory fault to Jones Act and Seaman's cases in conflict with the holding of this Court in Kernan v. American Dredging Co., 355 U.S. 426 predicating liability on statutory fault even in the absence of negligence?

REASONS FOR GRANTING THE WRIT

The questions presented are significant as affecting seamen, maritime and railroad workers protected by the FELA and Jones Act. Not only are these statutes affected with the public interest but the subject matter is directly concerned with safety statutes enacted for the protection of the health, life and limbs of the workers involved. The very volume of decisions of this Honorable Court dealing with maritime and railroad employees is demonstrative of the urgent compelling necessity to settle the policy of the law in these areas.

The decision below is in irreconcilable conflict with the holdings of the courts of appeal of other circuits applying the statutory fault rule to other than collision cases and in particular to cases of maritime personal injury. Thus, see Waterman SS Co. v. Shipowners and Merchants Towboat Company, 199 F. 2d 600 (Salvage); Richelieu and Ontarior Navigation Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422 (on marine insurance policy for stranding); Waterman SS Corp. v. Gay

Cottons, 414 F. 2d 724 (1969) and Pittsburgh SS Co. v. The Atomic, 107 F. Supp. 631 (for grounding); Andros Shipping Co. v. Panama Canal Co., 184 F. Supp. 246 (Colision); Boyer v. The Merry Queen, 202 F. 2d 575 and Eastern SS Co. v. International Harvester, 189 F. 2d 472 (collisions); The Denali, 105 F. 2d 413 aff'd sub nom; Alaska SS Co. v. Pacific Coast Coal Co. 311 U.S. 687; Petition of Summer A. Long, 439 F. 2d 109; Petition of Marine Sulphur Transport Corp., 312 F. Supp. 1081; Petition of Sincere Navigation Corp. (DCED, La.) Civil Action #68-22 54 (not officially reported); Provenza v. American Export Lines, Inc., 324 F. 2d 660 (cases of maritime personal injury).

Indeed, the holding below is such as to demonstrate confusions within the Second Circuit itself. Thus, in the case of petition of Long (The Smith Voyager) 439 F. 2d 109, decided March 3, 1971, the Court of Appeals for the Second Circuit in a non-collision limitation proceeding involving personal injury and death claims imposed liability and denied limitation on application of the statutory fault rule. In so ruling, both the District (293 F. Supp. 172) and the Court of Appeals relied upon the Pennsylvania doctrine.*

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*It is significant that Hays, Circuit Judge concurred in the Smith Voyager, supra, but abstained from concurrence in the opinion below as related to the subject of statutory fault.

On the other hand, in the case sub judice the Court of Appeals for the Second circuit in June of 1971 said "... it was not persuaded that there are broad considerations of policy requiring the extension of the Pennsylvania rule beyond the area of ship-collisions."

The existence of the confusion and conflict within the Second Circuit is expressly recognized by the Court of Appeals itself. In the cases of Seaboard Shipping Corp. as owner of Barge Oil Transfer 32, a petition for limitation of liability and Moran Inland Waterways Corp. as owner and Moran Touring and Transporation Co. Inc., as charterer of the Tug Margot Moran, a petition for limitation of liability, not officially reported, decided September 29, 1971, the Court unequivocally states that the contention is wrong that the Pennsylvania rule applies only in collision cases, and applied the rule in death cases.

The Court went on to say, "It is true that a panel of this Court has recently held the rule of the Pennsylvania inapplicable in the case of a seaman's death from a heart attack after a violation of statutory working hour limitations (referring to the case at bar). But another panel has specifically reached the same result as we do here in a Load Line Act (46 U.S.C. Sec. 85 (b), (e) violation case .," (referring to the petition of Long, supra).

There is no further attempt made to reconcile the acknowledged conflict.

Quite apart from the instant problem of clarifying the rule by which the case sub judice is to be re-tried, clearly the question as to whether the Pennsylvania rule is applicable to cases other than collision or property damage is a subject worthy of the consideration of this Court.

The opinion of the Court below emasculates the settled rationale of the statutory fault rule that such rule is a sanction to enforce compliance with regulations designed to promote maritime safety. Properly construed, the rule penalizes violators of safety rules by imposing on them a severe burden of proof that may be decisive when the causes of an accident are unknown or in dispute. The Andros Shipping Co. Ltd. v. The Panama Canal Co. (CA5) 298 F. 2d 720, 727; The Denali (CA9) 105 F. 2d 413, 418; aff'd sub nom; Alaska Steamship Co. v. Pacific Coast Coal Co., 311 U.S. 687.

The reasons for the application of the Pennsylvania rule to cases of personal injury are concisely stated by the Court of Appeals for the Ninth Circuit in The Denali, 105 F. 2d 413, (cert. denied 311 U.S. 687,) at page 418:

> "As this court, in reviewing and summarizing the cases, has said concerning the extraordinary burden of proof on violators of statutes governing vessels and their

> navigation and management, 'Failure to obey a statute does, indeed, penalize the violator. The penalty however, is not that the violator is to be held accountable for any mishap, regardless of its relation to the violation. The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the action, but that it could not have done so. This burden is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him.' (Emphasis supplied) The Princess Sophia, 9 Cir. 61 F. 2d, 339, 347." (Court's italics)

In seeking additional prerequisites for the application of the Pennsylvania rule the Court below deviated from the basic reason for its existence.

The statement of the court below that "the statutes on which liability in this case are predicated, contain no support for the kind of presumption the plaintiff seeks to have us apply" is further in direct conflict with the holding of the recent decision of this Court in Kernan v. American Dredging Co., 355 U.S. 426. It is true that in Kernan the causal connection had already been found to exist, but the holding of Kernan that liability will follow violation of the statute regardless of whether the statute violated was intended to prevent the accident that occurred is at direct odds with

the Court of Appeals statement herein that the statute itself must indicate that violation of its terms will carry with it the sanction of the Pennsylvania rule.

Indeed, the very operation of the Pennsylvania rule is to provide the inference of causal connection where proof of the same is either absent or in dispute. (The Denali, Andros Shipping Co., supra, and the New York Marine No. 10, 109 F. 2d 564, 566) and it is this failure of the Court below to so recognize that is central to the issue.

The statement of the Court of Appeals that application of the Pennsylvania rule may be regarded as "fair" in collision cases, whereas its "extension" to seamen's cases would be unfair will not bear the light of examination. We have already seen that the Pennsylvania rule has long since been in fact extended far beyond the limited area of collisions. Further, the suggestion that it is appropriate to apply the rule in collision cases, because each ship has access to information which others concerned with the casualty may not have access to, does not militate against the plaintiff herein; indeed shipowners who violated the safety statute have far more access to relevant information than she. Certainly, it is not to be suggested that property may be protected by the application of the Pennsylvania rule but life or injury to person are not the subject of such judicial concern.

CONCLUSION

The decision of the court below is in conflict not only with other decisions in the same Court but in conflict with decisions of the other circuits, and most importantly in conflict with the reason for the decision in Kerman v. American Dredging Co. in this Court itself. The principle of law concerned a very substantial number of the cases in an area of vital public importance. It is urgent that the law in this area be settled not only to secure justice herein but to avoid the numerous appeals and uncertainties that obtain in this area.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted and that this Court reverse or modify the holding of the Court below with instruction to remand the case to the District Court in accordance with the decision of the Court herein and for such other, further and different relief as to this Court shall seem just and proper.

Respectfully submitted,

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Counsel for Petitioner

Herbert Lebovici,
Of Counsel

APPENDIX A

Judgment, USDC SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARGARET ANN WILKINS, as Administratrix, of the Estate of WILLIAM LANE WILKINS, Deceased,

Plaintiff,

-against-

AMERICAN EXPORT ISBRADTSEN LINES, INC.,

Defendant.

The issue in the above entitled action on liability only, having been brought on regularly for trial before the Honorable Richard H. Levet, United States District Judge, and a jury on May 13, 15, 18, 19 and 20, 1970, and at the conclusion of the evidence the jury having returned a verdict in favor of the defendant, it is,

ORDERED, ADJUDGED AND DECREED: That the defendant AMERICAN EXPORT ISBRANDTSEN LINES, INC., have judgment against the plaintiff, MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, deceased, dismissing the complaint.

APPENDIX A

Judgment, USDC SDNY

Dated: New York, N.Y.
May 20, 1970

s/ John Livingston
Clerk

APPENDIX B

Notice of Appeal to the
U.S. Court of Appeals for
the Second Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARGARET ANN WILKINS, et ano.,

Plaintiff,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Defendant.

PLEASE TAKE NOTICE that MARGARET ANN WILKINS, plaintiff, in the above entitled action, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of this Court entered herein on the 20th day of May, 1970, and from each and every part thereof as well as the whole thereof as well as from each and every part of the judgment entered herein.

Dated: June 17, 1970
New York, New York

APPENDIX B

Notice of Appeal to the
U.S. Court of Appeals for
the Second Circuit

s/ Kenneth Heller
KENNETH HELLER, ESQ.
Attorney for Plaintiff
Office & P.O. Address
277 Broadway
New York, New York

TO: CLERK OF THE COURT

TO: FOLEY, GRAINGER & DARBY, ESQS.
Attorneys for Defendant
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26 Broadway
New York, New York.

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 764 - September Term, 1970.

(Argued April 29, 1971
Decided June 21, 1971)

Docket No. 35391

MARGARET ANN WILKINS, as Administratrix of the Estate of William Lane Wilkins,

Plaintiff-Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

BEFORE:

HAYS and FEINBERG, Circuit Judges,
and BLUMENFELD, District Judge*

Appeal from a judgment of the United States District Court for the Southern District of New York, Levet, Judge, entered upon a jury verdict for the defendant in a Jones Act Suit against a shipowner.

Reversed for a new trial.

HERBERT LEVOVICI, New York, N.Y. (Kenneth Heller, New York, N.Y., on the brief), for Plaintiff-Appellant.

THOMAS H. HEALEY, New York, N.Y. (Foley, Grainger & Darby, New York, N.Y., Walter A. Darby, Jr., Daniel L. Stonebridge, of counsel), for Defendant-Appellee.

* Of the District of Connecticut, sitting by designation.

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

BLUMENFELD, District Judge:

Plaintiff brought this action as administratrix of the Estate of William Lane Wilkins, an officer in the merchant marine, against his employer, the owner of the ship on which he was serving, to recover damages for his death, which resulted from a heart attack suffered at sea. We are constrained to remand for a new trial because of error in the exclusion of evidence relevant to the issue of proximate cause.

Wilkins was employed by the defendant as Chief Officer on board the S.S. Extavia from August 1964, when he signed articles for her forthcoming voyage, until October 6, 1964, the date of his death. On September 18, 1964, while traversing a leg of the homebound passage between Leghorn, Italy, and Barcelona, Spain, the S.S. Extavia, then in command of the second officer, suffered a collision with another vessel. Following the collision, Wilkins was required by the defendant to put in overtime hours in the performance of his duties (which were soon augmented by those of the second mate, who was relieved of all navigational duties on September 20, at 0400 hours). The core of the

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

plaintiff's contention was that the overtime work, required of Wilkins by the defendant in violation of 46 U.S.C. ¢¢235 and 673, was the proximate cause of the decedent's heart attach and ensuing death.

Whether measured by the provisions of one or the other of these statutes,[1]

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1 The trial court correctly held that insofar as overtime work aboard ship was concerned §235 was superseded by §673. Section 235 is applicable only to officers, whereas §673 applies to seamen as well. Indeed, §673 forbids a shipowner from requiring or permitting work for more than 8 hours in one day, whereas §235 provides that an officer shall not "be required to do duty to exceed nine hours of any twenty four while in port, . . . or more than twelve hours of any twenty four at sea . . ." (overtime work in emergencies is excepted, *see* p. 3709, *infra*).

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

the evidence at trial was that following the collision, with the lone exception of Sunday, October 4,[2] Wilkins had worked overtime on every day consecutively from September 19, 1964, through October 6, 1964, when he worked 19 hours. After he went off duty during the night of October 6, Wilkins showered and changed

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2 The number of hours worked by Wilkins each day:

September 19 - 17 hours
September 20 - 20 hours
September 21 - 9 hours
September 22 - 19 hours
September 23 - 12 hours
September 24 - 15 hours
September 25 - 15 hours
September 26 - 11 hours
September 27 - 11 hours
September 28 - 11 hours
September 29 - 11 hours
September 30 - 11 hours
October 1 - 11 hours
October 2 - 11 hours
October 3 - 10 hours
October 4 - 7 1/2 hours
October 5 - 12 hours
October 6 - 19 hours

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

his clothes. He then made a brief visit to the bridge and returned to his cabin. Shortly thereafter he suffered an acute heart attack manifested by extreme pain in his chest. A hurriedly summoned Coast Guard cutter rushed him to a hospital ashore, but he was reported to have died within minutes after his arrival there.

I.

During the early part of the trial, the court admitted into evidence as an exhibit a chart showing the hours concededly worked by Wilkins each day, broken down into watches within each 24-hour period. The first assigned error we consider is a ruling made with respect to this exhibit at a later stage of the trial. While evidence was still being taken, the trial court withdrew the exhibit and substituted in its place a truncated chart disclosing only the hours the decedent had worked aboard the ship on October 3, 4, 5 and 6.

To put this singular ruling into perspective, we set forth a brief resume of a portion of the medical testimony which apparently induced it. Two experts, one for each side, testified on the issue of causal connection between

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

Wilkins' overtime work and his death. What little conflict there was in the testimony of the medical experts as to the final cause of death was attributable to the differences in their medical interpretations of the stated cause of death on the death certificate and the pathological reports and slide sections resulting from an autopsy. They did not differ as to the final cause of death. They agreed he died as a result of an accute coronary insufficiency which induced ventricular fibrillation,[3] finally resulting in death.

In the opinion of Dr. Jacobi, who testified for the plaintiff, the "coronary insufficiency" was caused by a heart muscle spasm. Each successive

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[3] This was an explanation of what happens when insufficient blood flows through the arteries to the heart (coronary insufficiency). The heart keeps contracting, but with in sufficient blood it does not contract as a unit. Instead, each little fibre in the heart contracts on its own, causing the heart to flutter at an extremely high rate, a condition incompatible with life.

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

link in the chain of causation following the muscle spasm to ultimate death was supported by evidence obtained at the autopsy. But there was no anatomical evidence of what caused the heart muscle spasm. Plaintiff's counsel asked Dr. Jacobi whether there was a causal connection between the "overtime" and the heart muscle spasm. To what the judge described as a "bit-by-bit" hypothetical question, embracing the hours worked and the duties performed by Wilkins from the time of the collision at sea until Wilkins' heart attack, Dr. Jacobi answered:

> "I would say that both the physical activity over those areas that you have described on the sixth[4] and the tensional changes incident to the supervision, are perfectly

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4 The nature and extent of the kind of work he had been doing as exemplified by that particular day was fully described at trial by a pilot who had been taken aboard to navigate the ship through the St. Lawrence Seaway from Iroquois Lock to Toronto.

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

> adequate to explain the acute coronary insufficiency *by way of the spasm* of the coronary artery which eventuated in the changes that were found at autopsy". [Emphasis added.]

On redirect examination when asked whether the prior work history between September 18, 1964, and the vessel's arrival in Montreal (October 3) would have "any medical relationship to the susceptibility of the man to an acute coronary insufficiency after October 3, when the vessel left for Montreal," he answered that it would. After accepting the court's invitation to have the question read again, he answered "No."[5]

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[5] The sense educible from these two conflicting answers is, at least, ambiguous. On recross examination almost immediately thereafter, when asked, "do you mean that this man would have lived a normal life expectancy if he did not come into another situation of tensions and long hours of work," he answered: "That's right."

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

It is this response which was the apparent basis for the court's evidentiary ruling that the truncated chart be substituted for the chart covering the entire period from the collision to Wilkins' death.

It was error to withdraw from the jury the evidence of Wilkins' overtime work during the period from the collision to October 3. The jury was entitled to have this broader basis for an evaluation of the cause of the decedent's heart muscle spasm. It was not bound by the perimeter of expert testimony but rather was entitled to substitute its own practical judgment for that of the expert. The fact that the question put to the doctor is the kind which cannot be answered on the basis of empirical knowledge or with scientific accuracy, does not mean that a jury's answer to it would be irrational. They were not bound to stay on a scientific platform.[6]

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6 Actually, the plaintiff's doctor had testified that it was his professional opinion that a man with a job involving tension and occasional manual work is a candidate for a heart attack if the tension is sufficient and prolonged enough or the work prolonged enough under those (previously described) conditions.

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit.

The idea that proximate cause between an internal human physical condition and external stimuli cannot be established except by the testimony of a medical witness was expressly rejected by the Supreme Court in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959):

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause . . . . The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation".

Any possibility that the error might be regarded as harmless in light of the other evidence at the trial must be rejected. The force of the trial judge's action was enhanced by his specific instruction to the jury not

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

to consider any evidence pertaining to the decedent's activities prior to October 3, 1964.[7]

II.

An adverse ruling by the trial court on the plaintiff's claim that she was entitled to the benefit of a presumption on the issue of proximate cause is also asserted as error. At the trial, the judge rejected the plaintiff's contention that the burden was on the defendant shipowner to prove that its statutory violation not only did not but could not have contributed to the decedent's death. This contention relates to the inescapable precondition to liability that there

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[7] The jury was charged:
"In this determination of whether the defendant violated the statute in question, you are to consider only the evidence which pertains to the decedent's activities on the ship from October 3rd, 1964 onward. You are not to consider any evidence which pertains to the decedent's activities prior to October 3rd, 1964."

must be a causal connection between the tortious conduct of the defendant and the injury sustained by the plaintiff.[8]

8 The plaintiff's reliance on *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), to circumvent that precondition is misplaced. Although it was decided in that case that the scope of liability imposed on shipowners in Jones Act cases for injuries to seamen resulting from, or caused by, a violation of a statutory duty is not limited to those injuries against which the statute is designed to afford protection, the Court did not go so far as to hold that a causal connection was presumed to exist between the statutory violation and the alleged injury. In *Nolan v. Greene*, 383 F.2d 814, 817 (6th Cir. 1967), it was expressly held that *Kernan* does not relieve the plaintiff of the burden of proving causation:

> "Although the case does hold that recovery may be had under the Jones Act for the death of a seaman in the absence of negligence when there has been a breach of a statutory duty, there must be a causal connection between the breach of the statutory duty and the death of the seaman. In the instant case there is no proof that failure to provide fire extinguishers even remotely caused the death of plaintiff's husband."

See also, *Epling v. M.T. Epling Co.*, 435 F.2d 732,735 (6th Cir. 1970).

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

Since this issue is likely to arise on a retrial, we deem it advisable to consider it now. We think Judge Levet properly allocated the burden of proof on the issue of causation to the plaintiff.

A feature of our Anglo-American adversary system is that the task of adducing evidence rests on the parties in the proceeding. Inherent in that system is the general rule that, as between two parties, he who desires to have judicial action taken in his behalf has the burden of producing the evidence which is a prerequisite to such action. See generally, IX J. Wigmore, Evidence 270-84, §§2485-2487 (3rd ed. 1940, Supp. 1970). Of course, in some situations proof of one fact provides a basis for inferring another. However, there is a significant difference between using one fact as evidence of another, and using the proof of one fact to impose on the party against whom it is directed the burden of proving the non-existence of another. In order to shift the burden of proof to that extent there must be a presumption that the other exists.

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

The operation of a presumption is often described, for this is a rule of law as to which the jury must be instructed. But the cases do not clearly define the ingredients out of which a presumption is created.[9] It is generally understood that in law for a specified fact to be presumptive evidence of another it must be one which in common experience leads naturally and logically to that other. *Tot v. United States*, 319 U.S. 463, 467 (1943). Cf. *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916).

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[9] Professor McCormick says: "The reasons for the recognition of presumptions by the courts are various. First and foremost is the reason of probability. In certain recurring fact-situations it becomes accepted by the judges that the proof of fact A renders the inference of the existence of fact B so probable that it is sensible and time-saving to assume the truth of fact B until the adversary disproves it." C. McCormick, *Evidence* 641, §309 (1954).

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

It is clear, we think, that in holding in part I of this opinion that the evidence of Wilkins' earlier overtime work was not so devoid of probative value as to forbid an inference that it caused his heart attack, we were not saying that it is common experience that any amount of overtime work in violation of the statute causes bodily injury to a seaman. A justifiable inference is not a synonym for a presumption.

The statutes on which liability in this case was predicated contain no support for the kind of presumption the plaintiff seeks to have us apply. Whatever light is shed on this point indicates the contrary. The following portions are relevant. Section 673 of Title 46 U.S.C. provides:

> "No licensed officer or seaman... shall be required or permitted to work more than eight hours in one day except in case of extraordinary emergency affecting the safety of the vessel and/or life or property...[N] or shall any licensed officer or seaman in the deck or engine department be required to work more than eight hours in one day; but these provisions shall not limit

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

> either the authority of the master or other officer or the obedience of the seamen when in the judgment of the master or other officer the whole or any part of the crew are needed for maneuvering, shifting berth, mooring, or unmooring, the vessel or the performance of work necessary for the safety of the vessel, her passengers, crew, and cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea, from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, or other drills. . . . "

The statutory exceptions from the prohibition of overtime work thus specifically permit more strenuous exertion than usual under more difficult and tension-producing conditions than ordinarily faced. Thus, the statute is obviously at odds with a view that in common experience any overtime work leads naturally and logically to bodily injury of the worker, and furnishes no basis for fashioning the kind of presumption the plaintiff urges upon us.

APPENDIX C

Decision and Judgment of the U.S. Court of Appeals for the Second Circuit

The rule for which the plaintiff contends has been excerpted from the rule of The Pennsylvania,[10] named after the case in which it was first enunciated by the Supreme Court, *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873). The rule of The Pennsylvania, examined in its entirety, incorporates the reasons for its own adoption:

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[10] The Pennsylvania rule, which shifts the ultimate burden onto the defendant to disprove the presumed fact, has been assessed as "...a drastic and unusual presumption. . ." G/ Gilmore & C. Black, *The Law of Admiralty*, 404 §7-5 (1957). *But see* Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States) Rule 301 (March 1971).

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

> ". . . But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute...." *Id.* at 136.

The logical probability that fault of the ship is the cause of a collision is based on wide experience in maritime navigation and is authoritatively attested to by Professors Gilmore and Black, who report:

> "The collision case is rare in which there is not at least some arguable reason for regarding both vessels at fault . . . ." *The Law of Admiralty*, *supra*, at 408 §7-6.

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

Moreover, the Pennsylvania rule might be regarded as fair because each ship involved in a collision has superior means to the access of evidence, bearing on fault.[11] However, no such considerations apply to the idiosyncrasies of information which bear on the cause of an injury sustained by a seaman.

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[11] It is noteworthy that The Pennsylvania rule, even as applied in ship collision cases, has been abolished by those most affected by its operation. The legal presumption of fault in collision cases was expressly rejected in the thoroughly considered and carefully drafted Brussels Collision Liability Convention of 1910, to which most nations, including England from whose law our Supreme Court adopted it, now adhere. Article 6 of the Convention provides: "There shall be no legal presumption of fault in regard to liability for collision." *See* Comment, *The Difficult Quest for a Uniform Maritime Law*, 64 Yale L.J. 878, 888 and nn. 51, 52; *Law of Admiralty*, *supra*, at 401.

APPENDIX C

Decision and Judgment of the
U.S. Court of Appeals for the
Second Circuit

Finally, as a judgmental matter, we are not persuaded that there are broad considerations of policy which require that we extend the admiralty rule of The Pennsylvania beyond the chosen area of ship collisions to embrace Jones Act cases.

The Judgment for the defendant is reversed and a new trial ordered.

HAYS, *Circuit Judge* (concurring in the result):

I concur in the result and in Section I of the majority opinion.

APPENDIX D

Order Denying petition for rehearing by appellant with request for certification of a question to the Supreme Court

35391

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Margaret Ann Wilkins, as Administratrix of the Estate of William Lane Wilkins, Deceased,

Plaintiff-Appellant,

v.

American Export Isbrandtsen Lines, Inc.,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant, with a request, in the alternative for certification of a question to the Supreme Court of the United States pursuant to 28 United States Court of Appeals 1252 (3)

Upon consideration thereof, it is

APPENDIX D

Order Denying petition for rehearing by appellant with request for certification of a question to the Supreme Court

Ordered that said petition be and it hereby is denied.

July 19, 1971.

PAUL R. HAYS USCJ

WILFRED FEINBERG USCJ

M JOSEPH BLUMENFELD by PRH
USDJ

APPENDIX E

Order denying petition for rehearing by appellee

35391

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Margaret Ann Wilkins, as Administratrix of the Estate of William Lane Wilkins, Deceased,

Plaintiff-Appellant,

v.

American Export Isbrandtsen Lines, Inc.,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

APPENDIX E

Order denying petition for rehearing by appellee

PAUL R. HAYS USCJ

WILFRED FEINBERG USCJ

M. JOSEPH BLUMENFELD by PRH
USDJ

July 19, 1971

APPENDIX F

Order denying petition

35391

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Margaret Ann Wilkins, as Administratrix of the Estate of William Lane Wilkins, Deceased,

Plaintiff-Appellant,

v.

American Export Isbrandtsen Lines, Inc.,

Defendant-Appellee.

A petition for a renearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

July 19, 1971 s/ Henry Friendly
Chief Judge

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-536

MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, Deceased,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

PETITION FOR RE-HEARING AFTER DENIAL OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

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Of Counsel.

TABLE OF CONTENTS

	PAGE
Previous Proceedings	1
Reasons for Re-Hearing	2
POINT I - BOTH THE ERROR AND THE IMPORTANCE OF THE ISSUED SOUGHT TO BE BROUGHT BEFORE THIS COURT ARE INDICATED IN THE DECISION OF IN RE: SEABOARD SHIPPING CORPORATION, 449 F.2d 132	3
POINT II- IN DENYING CERTIORARI, THIS COURT MAY HAVE BEEN MISLED BY THE ERRONEOUS ALLEGATIONS OF THE ANSWERING BRIEF OF THE RESPONDENT HEREIN	6

Page

CASES CITED

Epling v. M.T. Epling,
435 F. 2d 732 5,7

In re: Seabord Shipping
Corporation,
449 F. 2d 132 (CA2) 2,3,4,5

Kernan v. American Dredging
Co., 355 U.S. 426 6,7

Lewis v. Hudson Waterways
Corporation, in the Southern
District of New York,
Ind. #67 Civ. 4288 5

Nolan v. Greene,
383 F.2d 814 5,7

Petition of Long (The
Smith Voyager),
439 F. 2d 109 3,5

Petition of Marine Sulpher
Transport Corp.,
312 F. Supp. 1081 5

Petition of Sincere Navigation
Corp., (DCED, La),
Ind. #68-22-54 5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-536

MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, Deceased,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Respondent.

PETITION FOR RE-HEARING AFTER DENIAL OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

The Petitioner for certiorari herein respectfully submits the following application for re-hearing of this Court's order made the 10th day of January, 1972 denying Petitioner's Petition for certiorari filed the 15th day of October , 1971.

PREVIOUS PROCEEDINGS

Heretofor the Petitioner herein, MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, deceased, petitioned this Court for certiorari after the decision of the Second Circuit Court of Appeals holding

that the Pennsylvania Rule, more particularly referred to hereinafter, was not applicable to a seaman's case under the Jones Act but was applicable only in collision cases.

Subsequent to the filing of the original Petition herein, the Respondent submitted an answering brief to the Petitioner's Petition for certiorari. At the time that this Court made its order, denying Petitioner's original Petition, there was a reply brief at the printer in preparation for submission to this Court. This brief pointed out that after the filing of the Petition herein, a most important case dealing directly with the subject of the Petition had been published, to with, SEABOARD SHIPPING CORPORATION, 449 F.2d 132 (CA2).

It is respectfully submitted that material contained in the reply brief that was never filed, and which will be alluded to hereinafter, contained material which might well have resulted in a different ruling on Petitioner's original Petition for certiorari and which should impel the Court to a granting of certiorari on this application for a re-hearing.

REASONS FOR RE-HEARING

It is respectfully submitted that there are two ultimate reasons why re-hearing and certiorari should be granted. These are:

1. The decision in the case of IN RE: SEABOARD SHIPPING CORPORATION, 449 F.2d 132, published subsequently to the filing of Petitioner's original Petition for certiorari, and,

2. A reply to the answering brief of the respondent, had it been received prior to the Court's decision, would have indicated misrepresentation, mis-statement and error in the answering brief with respect to material that may well have influenced the Court's decision.

POINT I

BOTH THE ERROR AND THE IMPORTANCE OF THE ISSUED SOUGHT TO BE BROUGHT BEFORE THIS COURT ARE INDICATED IN THE DECISION OF IN RE: SEABOARD SHIPPING CORPORATION, 449 F.2d 132.

Subsequently to the filing of the Petitioner's Petition herein, and, therefore, unavailable for inclusion in the original Petition itself, there was published the decision in the SEABOARD SHIPPING CORPORATION case. This decision of the Second Circuit Court of Appeals, decided by a different panel from the one that decided the within WILKINS case, and also by a panel different from the one that decided the PETITION OF LONG (THE SMITH VOYAGER), 439 F.2d 109, held, as did the SMITH VOYAGER, and directly contrary to the holding in the WILKINS case, that in the event of statutory violation, the doctrine of the Pennsylvania Rule could be invoked in a personal injury case brough pursuant to the Jones Act.

In flat contradiction to the decision in the WILKINS case herein, which the respondent would uphold, the Court of Appeals in the SEABOARD SHIPPING case stated:

> "Seaboard argues, however, that there was no evidence that any of the barge's defects or Seaboard's negligent acts caused the deaths, and that therefore there is a failure of proof. We need go no further here than to say, however, that given the statutory violations alone (the liferaft stowage and the overloading), Seaboard is not entitled to exoneration. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136, 22 L.Ed. 148 (1873), makes it clear that the burden is on a ship in violation of a safety statute--in this case the barge--to show 'not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been'. Seaboard is wrong in its contention that admiralty applies this rule only in collision cases. Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958) (fire on a tug caused by open-flame kerosene lamp carried on a scow in statutory violation); The Denali, 112 F.2d 952 (9th Cir. 1940) (stranding case). It is true that a panel of this court has recently held the rule of THE PENNSYLVANIA inapplicable in the case of a seaman's death from a heart attach after a violation of statutory working

hour limitation. Wilkins v. American Isbrandtsen Lines, Inc., 446 F.2d 480 (2d Cir. June 21, 1971)." (Emphasis added).

Thus, two panels of the Second Circuit have held in one way and in our WILKINS case directly opposite. Nor can the opposing holdings be reconciled in any fashion. Furthermore, as appears from the original Petition filed herein, the holdings of the SEABOARD and SMITH VOYAGER cases are claimed by the respondent to be in conflict with the cases of NOLAN v. GREENE, 383 F.2d 814, and EPLING v. M.T. EPLING, 435 F.2d 732, decisions rendered by the Court of Appeals for the Sixth Circuit.

Additionally, your Petitioner would advise the Court that as late as January 24, 1972, the same issue was before the Trial Court in a case entitled LEWIS v. HUDSON WATERWAYS CORPORATION, in the Southern District of New York, Ind. #67 Civ. 4288. In that case, the Trial Judge chose to follow the WILKINS decision as distinguished from the latter SMITH VOYAGER and SEABOARD decisions, supra. The frequency of conflicting decisions on the important point here under consideration, in two important other recent decisions such as PETITION OF MARINE SULPHER TRANSPORT CORP., 312 F.supp 1081 (now on appeal and PETITION OF SINCERE NAVIGATION CORP. (DCED,La), Ind. #68-22-54, we believe must indicate to the Court the importance of a ruling on this issue. Whether or not the Pennsylvania Rule is applicable in a personal injury action under the Jones Act in the presence of

a statutory violation. Apart from the general applicability of the legal issue thus needing clarification, it is respectfully submitted that it is unfair to send the instant case back for new trial, as the ruling of the Second Circuit would do under a ruling which is at least prima facie erroneous.

POINT II

IN DENYING CERTIORARI, THIS COURT MAY HAVE BEEN MISLED BY THE ERRONEOUS ALLEGATIONS OF THE ANSWERING BRIEF OF THE RESPONDENT HEREIN.

Though posed in different forms in the original Petition herein, the essential question presented on this application for certiorari is whether or not the Pennsylvania Rule, which in the case of a statutory violation requires that,

> "....the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so."

Essentially, the rule reverses the burden of proof as between the plaintiff and defendant where proof of statutory violation by the respondent is present. In its answering brief, the respondent made the clearly erroneous and unsupported statement that KERNAN v. AMERICAN DREDGING CO., 355 U.S. 426, supported its position that the Pennsylvania Rule was inapplicable. So also, the respondent, in its answering

brief, claimed that NOLAN v. GREENE, 383 F.2d 814, and EPLING v. M.T. EPLING, 435 F.2d 732, supported its position that the Pennsylvania Rule could not be applicable. Unlike KERNAN, these latter two cases could arguably be claimed to support the respondent's position, though more reasonably read, the facts in each of them were such as to indicate only that the Pennsylvania Rule could not be applicable to those cases because on the facts of each, the statutory violation complained of could, as a matter of fact, "not possibly" have contributed to the injury occurring.

So to, the respondent, in its answering brief, spoke without documentation of a "long history of well-respected and near unanimous maritime authority" as supporting its position. Though reference to our main Petition herein would clearly indicate that there is no such "long history" or "unanimous authority", it is possible that this Court was misled.

It is further likely that the Court may have been misled by the respondent's mis-statements and distortions in paraphrasing the question presented by the Petitioner's original Petition herein and in posing three questions which it claimed were presented by the Petition. Thus, the respordent posed the question,

> "Can a Petitioner seek a review by certiorari on the anticipatory theory that events on trial will be improper and adverse?"

Obviously, where it is claimed, as it is here, that ruling of the Circuit Court for the Second Circuit, which sends the case back for re-trial under an erroneous ruling extremely disadvantageous to the Administratrix, it is required to be anticipated that the ruling in the Court below will be erroneous. The Trial Court is required to follow the ruling of the Second Circuit in this case.

The Respondent further posed the question which assumed that there was no divergence between the decisions of the circuits or within the Second Circuit itself. Again, this divergence is clearly demonstrable by inspection, but in the absence of reply by the Petition, the Court may well have not been appreciative of the nature and extent, or for that matter, of the importance of the divergence.

Finally, the Respondent in its answering brief, alleged that the divergences between the various rulings were merely divergences of dicta. Again, inspection of the conflicting decisions must show that such is not the case, but in the haste that must attend up so many applications to this Court, it may well be that the Court was influenced by the erroneous and, unfortunately, answered allegation.

WHEREFORE it is respectfully submitted,

1. That the subject to be reviewed

is one of broad concern in an area where great divergence and conflict with attendant confusion has resulted.

2. The principle of law in question concerns a very substantial number of cases in an area of vital public importance.

3. It is urgent that the law in this area be settled not only to secure justice in the instant case, but to avoid the numerous appeals and uncertainties that presently obtain in this area.

4. That re-hearing should be granted, and upon re-hearing, the Petitioner's Petition for certiorari should likewise be granted and the case be directed to the Court of Appeals with instructions for the application of the Pennsylvania Rule or alternatively, that the case be placed upon the calendar of this Court for argument and determination in the normal course.

Respectfully submitted,

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